

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**MAHURIN CONSTRUCTION CO.,**

**Plaintiff,**

**v.**

**GRANITE RE, INC. and MILLER PAVING  
AND CONSTRUCTION, LLC,**

**Defendants.**

**CIVIL ACTION**

**No. 04-2174-CM**

**MEMORANDUM AND ORDER**

This matter comes before the court on plaintiff Mahurin Construction Co.'s Motion for Leave to File First Amended Complaint (Doc. 33), which was filed on July 15, 2005. Plaintiff seeks leave to amend its complaint to allege a claim against defendant Granite RE, Inc. ("Granite") for vexatious refusal to pay and to request attorney's fees under Kan. Stat. Ann. § 40-256.

On July 29, 2005, defendants requested, and the court subsequently granted, an extension of time to respond to plaintiff's motion to amend the complaint until August 8, 2005. Defendants failed to file a response by August 8, 2005. On August 10, 2005, defendants filed their second motion for extension of time to respond (Doc. 37) and proposed a deadline of September 30, 2005, citing illness of counsel<sup>1</sup> and the need to conduct additional investigation into the information contained in plaintiff's motion to amend. Plaintiff opposed defendants' request for the second extension of time, and the court did not enter an order

---

<sup>1</sup> Defendants are both represented by the same counsel.

denying or granting defendants' proposed extension of time. Defendants did not follow up with the court, and neither defendant filed a response, either before or after their proposed September 30 deadline.

At this point, the court denies defendants' second motion for extension of time to respond, and considers plaintiff's motion to amend as unopposed. Pursuant to Local Rule 7.4, "[i]f a respondent fails to file a response within the time required by Rule 6.1(d), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." However, because defendants did make some argument against plaintiff's proposed amendment in their motions for extension of time, the court briefly discusses the merits of plaintiff's motion to amend.

## **I. Facts**

Plaintiff brought a suit on bond (Count I) against defendant Granite, alleging that defendant Granite, as surety, issued a statutory bond which named defendant Miller as the principal. Plaintiff alleges it subcontracted with defendant Miller, a general contractor, to perform improvement work for the City of Overland Park, and that defendant Miller did not pay plaintiff for its work. Plaintiff alleges that it submitted a claim to defendant Granite to obtain payment on the bond, which defendant Granite refused to pay. Defendant Miller subsequently intervened in the action and brought a breach of contract claim against plaintiff. Plaintiff brought a breach of contract counterclaim against defendant Miller. Plaintiff's current motion seeks leave to assert an additional claim of vexatious refusal to pay on the bond against defendant Granite.

## **II. Standard for Ruling on a Motion to Amend**

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This is a "mandate . . . to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Leave to amend is a matter

committed to the court's sound discretion and is not to be denied without the court giving some reason or cause on the record. *Fed. Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 387 (10<sup>th</sup> Cir. 1987). Leave may be denied when the amendment would cause undue prejudice to the opposing party, when the movant has "unduly and inexplicably delayed" in requesting leave, when the movant acts on a "bad faith or dilatory motive," or when the amendment would be futile. *Foman*, 371 U.S. at 182; *State Distribs., Inc. v. Glenmore Distilleries*, 738 F.2d 405, 416 (10<sup>th</sup> Cir. 1984). In exercising its discretion, the court must be mindful that the Federal Rules of Civil Procedure are designed to facilitate decisions on the merits rather than on pleading technicalities. *Koch v. Koch Indus.*, 127 F.R.D. 206, 209 (D. Kan. 1989).

Untimeliness or undue delay is cause for denying leave to amend without any showing of prejudice to the other party. *Las Vegas Ice & Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10<sup>th</sup> Cir. 1990). Leave may be denied when the movant has known of the facts upon which the amendment is based and fails to include them in earlier complaints, *State Distribs.*, 738 F.2d at 416, or waits for some time before filing the motion to amend, *Federal Ins.*, 823 F.2d at 387. While it is true that the court may deny leave to amend when a plaintiff could have added claims earlier, a denial is not mandated. *See Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1495 (10<sup>th</sup> Cir. 1995) (citation omitted) ("Untimeliness in itself *can* be a sufficient reason to deny leave to amend, particularly when the movant provides no adequate explanation for the delay.") (emphasis added). The decision whether to grant leave to amend is discretionary.

### **III. Analysis**

In this case, there is no reason or cause in the record which would support denying leave to amend due to bad faith or untimeliness by plaintiff. In support of its motion, plaintiff explained that the factual basis

for the proposed amendment was brought to its attention during discovery and that it filed for leave to amend as quickly as possible. There is no indication that plaintiff was aware of these facts earlier. The court recognizes that, although the request to amend was filed near the end of discovery, it is plaintiff's first request, and an adequate explanation for the delay was provided with the request. The court accepts plaintiff's explanation that the delay was not caused by bad faith or dilatory motive.

The court further finds that the proposed amendment would not cause undue prejudice to defendant Granite. In its original complaint, plaintiff alleged that defendant Granite was liable under the bond because defendant Miller, the principal, had refused to pay. Plaintiff alleged that it submitted a claim to defendant Granite, which defendant Granite refused to pay. The proposed amendment further alleges that defendant Granite has refused without just cause or excuse to pay plaintiff. The proposed claim appears to derive from plaintiff's bond claim against defendant Granite; thus defendant Granite was already on notice of the underlying basis of the plaintiff's claims. The court has conducted a cursory analysis of the legal basis of the proposed claim, as it derives from the suit on bond, and finds that, at this point in the litigation, the claim would survive a motion to dismiss.

Accordingly, the court grants plaintiff's motion for leave to amend in its entirety. **Pursuant to D. Kan. Rule 15.1, plaintiff shall file and serve its first amended complaint on defendants within ten days after the date of this Order.**

**IT IS THEREFORE ORDERED** that plaintiff's Motion for Leave to File First Amended Complaint (Doc.33) is granted.

**IT IS FURTHER ORDERED** that defendants' Second Motion for Extension of Time to File Response as to Motion for Leave to Amend Complaint (Doc. 37) is denied.

Dated this 18th day of January 2006, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**